

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27**

THE WEITZ CO., LLC

Employer,

and

Case 27-RC-8598

CARPENTERS DISTRICT COUNCIL
OF KANSAS CITY AND VICINITY,

Petitioner.

DECISION AND DIRECTION OF ELECTION

On April 30, 2010, Carpenters District Council of Kansas City and Vicinity (Petitioner or Union) filed a petition under Section 9(c) of the National Labor Relations Act (the Act), seeking to represent the carpenter craft employees employed by The Weitz Co., LLC (Employer). On May 12, 2010, a hearing was held before Hearing Officer Renee C. Barker. Following the close of the hearing, the Employer and Petitioner timely filed post-hearing briefs.¹

At the start of the hearing, the Employer and Petitioner agreed that the sole issue to be litigated was the supervisory status of the Employer's three general foremen. The

¹ Counsel for Laborers' International Union Local 720 entered an appearance at the start of the hearing as a party in interest. Laborers' Local 720 specifically declined to intervene in the proceedings, and stated that it was there to be assured that the Petitioner was not seeking to represent laborers. Laborer's Local 720 did not participate in the examination of witnesses or file a post-hearing brief.

Employer contends, contrary to the Petitioner, that the general foremen possess and exercise the Section 2(11) supervisory indicia to effectively recommend the hire, transfer, layoff, and promotion of employees, and to assign and direct work and discipline employees. Accordingly, the Employer contends that the general foremen must be excluded from the petitioned-for bargaining unit.

I conclude that the Employer has met its burden of establishing that the general foremen are statutory supervisors. In this regard, the general foremen possess and exercise Section 2(11) authority to lay off employees and also to assign the work of employees using independent judgment because they can grant or deny employee requests for time off. *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006); *Croft Metals, Inc.*, 348 NLRB 717 (2006); and *Golden Crest Healthcare Center*, 348 NLRB 727 (2006). Accordingly, I shall exclude the general foremen from the unit.

STATEMENT OF THE CASE

Under Section 3(b) of the Act, the Board has delegated its authority in this proceeding to me. Upon the entire record in this proceeding, I find:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.²
2. The parties stipulated, and I find, that the Employer, The Weitz Co., LLC, is an Iowa limited liability corporation engaged in commerce within the meaning of section 2(6) and (7) of the Act and that it is subject to the jurisdiction of the Board. Specifically, the Employer has a facility located in Denver, Colorado, where it is engaged in the general building construction industry. During the last calendar year, the Employer purchased and

² The record reflects that the Petitioner issued a subpoena duces tecum to the Employer, and the Employer timely filed a motion to quash. The Employer's motion was referred to the Hearing Officer for ruling. At the close of the hearing, the Petitioner informed the Hearing Officer that it declined to pursue further any issues related to its subpoena on the basis that it did not want to delay my ruling on the supervisory status of the general foremen, but requested that I draw an adverse inference from the Employer's failure to produce the subpoenaed documents. I find that it would be inappropriate to draw an adverse inference based on the fact that the Petitioner declined to pursue its subpoena request and allowed the Hearing Officer to close the record.

received at its Denver, Colorado facility, goods and services valued in excess of \$50,000 from suppliers located outside the State of Colorado.

3. The labor organization involved claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.
5. It is appropriate to direct an election in the following unit of employees:³

Included: All full-time and regular part-time foremen, journeymen, apprentices, and provisional employees performing work in any branch of the carpentry trade for the Employer on any jobsite in Colorado.

Excluded: Professional employees, clerical employees, laborers, guards, and supervisors as defined by the Act.⁴

STATEMENT OF FACTS

A. Bargaining History

The parties stipulated that the Employer and Petitioner have had a long-term collective-bargaining relationship, dating back at least 20 years. They further stipulated that the Employer and Petitioner have been parties to successive collective-bargaining agreements, the most recent of which expired in 2010.

The general foremen were included in the bargaining unit under the historical bargaining agreements, and, accordingly, their terms and conditions of employment

³ The parties stipulated that voter eligibility should be determined by the *Daniel/Steiny* construction industry eligibility formula. See *Daniel Construction Company*, 133 NLRB 264 (1961), as modified in 167 NLRB 1078 (1967); *Steiny & Co.*, 308 NLRB 1323 (1992).

⁴ This unit description above does not comport with the stipulated language agreed to by the parties at the hearing only insofar as it does not reference the 2007 AGC Building Construction Master Agreement with Petitioner. I note that the jurisdictional language in that Agreement is several pages long and such language is not necessary to describe the appropriate unit in this case. The parties also specifically stipulated that foremen are not statutory supervisors and should be included in the unit. Since the record evidence supports this stipulation, I am including the foremen in the unit.

were governed by the contract. In addition to the contractual benefits, however, the general foremen are also included in the so-called Red Circle Program, which entitles them to 5 percent annual bonuses based on their annual earnings. General foremen also receive six paid holidays a year, which the other bargaining unit employees do not receive under the contract.

B. The Employer's Operations

The Employer is a general contractor specializing in concrete work. The only operations at issue herein are its Colorado operations. The Employer subcontracts much of its bid work, but "self-performs" concrete work, including both horizontal and vertical concrete work. The Employer currently has four on-going projects, one of which is in its final stages. As a result, there are currently only about 12 journeymen and apprentice carpenter craft employees in the bargaining unit. The Employer utilizes the Union's hiring hall for additional manpower.

The Employer's managerial and supervisory hierarchy consists of the construction manager, the general superintendent, senior superintendents, project superintendents, and field superintendents.⁵ The general superintendent, Greg Pavlich, was the Employer's only witness in this proceeding.

There are three carpenter general foremen at issue in this proceeding. They are Tim Croon, Steve Collins, and Mark Jackson. These three general foremen report directly to the lowest level superintendent on any given project. Mark Jackson, called

⁵ The parties stipulated that all of the superintendents are statutory supervisors on the basis that they possess and exercise one or more of the supervisory indicia enumerated in Section 2(11) of the Act. Since this stipulation is supported by the record evidence, I shall exclude superintendents from the bargaining unit.

as a witness for the Petitioner, is the only general foreman who testified in this proceeding.

On large projects, the Employer may have all of the different levels of superintendents present, from the general superintendent down to the field superintendent level, plus a general foreman. A smaller scale project may have one superintendent and a general foreman. A project can also have various combinations of superintendent levels, and may not necessarily have a general foreman. The only time the general foremen are the highest ranking employees on a jobsite is if there is Saturday overtime work being performed.

The general superintendent, or a senior or project superintendent, are typically in charge of the entire construction project, including safety, scheduling, and the budget. The highest level superintendent spends almost his entire time in the office or in meetings with the various parties to the construction project. This entails coordinating the subcontractors, and working in concert with the owner of the project, the architects, and the local building departments.

On projects where there are field superintendents reporting to a higher level superintendent, the field superintendents spend more than half of their day in the field. These field superintendents are responsible for the “minute-by-minute” details of the actual construction. The field superintendents meet with the subcontractors on site performing work, and oversee the general foremen assigned to the project. This oversight by the field superintendents includes determining crew sizes based on budgetary constraints, and determining on a day-by-day basis, what work must be performed, either in concert with the subcontractors, or in advance of them.

The general foremen are primarily involved with the Employer's self-performed work, but they also assist the field superintendents coordinating the self-performed work with the work done by the subcontractors. The general foremen are directly in charge of the combined crews of carpenter craft and laborer employees. The various craft general foremen on any given project share an office with all the other general foremen, but spend the majority of their time in the field where the crews are working. Notwithstanding that the general foremen spend the majority of their time in the field, they only wear their tools about ten percent of the time when the project is in full swing because of their other duties and responsibilities. The only tool the general foremen carry most of the time is a tape measure. At the start up or end of a project, the general foremen may be called upon to work more with their tools.

The crews assigned to the general foremen each have an assigned foreman, and as many as ten journeymen carpenters, apprentice carpenters, and laborers. On any given project, these combined crews of the Employer's employees might be reporting to a labor general foreman or a carpenter general foreman.

C. General Foremen

1. General duties and responsibilities:

General foremen may have between 1 and 30 employees reporting to them at any one time, depending on the size and status of the project. The general foremen are in charge of overseeing the safety of the crews, any issues related to manpower, and ordering material and equipment from the Employer's yard in accordance with the project needs. The general foremen spend most of their time making sure that the carpenter construction work is being done safely, correctly, and in a timely manner. The

general foremen are also responsible for dealing with subcontractors to make sure their work is performed so that the self-performed work can be done on time. The general foremen also interact with inspectors and make sure inspections are performed before each stage of construction. For instance, the general foremen will make sure the rebar inspector has signed off on the work before the concrete is poured.

2. Authority to effectively recommend hire, transfer, layoff, and promotions:

The Employer contends that the general foremen possess and exercise authority to effectively recommend the hire, transfer, layoff, and promotions of employees. I shall set forth the facts regarding each of these indicia immediately below.

a. Authority to recommend the hire of employees

Crew sizes are determined by the labor budget on a given project. As the project ramps up, the general foreman or the superintendent will determine when it is time to start bringing in more manpower. The ultimate decision of when to hire more employees is made by the superintendent. Some superintendents call for dispatches on their own, and others relay their decision to the general foremen and instruct the general foremen to call the Union hall for dispatches.

All new-hires report to the Employer's yard for orientation on the Employer's policies and procedures. This orientation is given by the yard administrator and human resources. General foremen are not involved in this orientation process.

Once new-hires have completed orientation, they report to the Employer's construction trailer at the project to which they have been dispatched. The employees are then given the so-called "site orientation." This site orientation includes an explanation of the project, safety rules, parking, and the Employer's work rules. Site

orientations are done by both general foremen and superintendents, based solely on who is immediately available when the employee arrives at the jobsite.

b. Authority to recommend the transfer of employees

The Employer contends that the general foremen have the authority to recommend the transfer of employees. The record is devoid of evidence to support this contention beyond the fact that a superintendent may decide to transfer employees to another project instead of laying them off if a general foreman recommends that they are no longer needed on the current project.

c. Authority to recommend the layoff of employees

As a project begins to wind down, the highest level superintendent will instruct the lower level superintendents and the general foremen that they need to cut back employees. At that time, the general foreman will talk with his foreman about the men on the crews to get input about the individual employee's skills, attendance, and productivity. The general foreman will then make recommendations to the superintendent as to who the general foreman believes should be let go. Occasionally, the foremen will participate directly in this discussion between the general foremen and the superintendent. The general foreman who testified stated that he will make his recommendations based on who he believes is more "well-rounded," and therefore more beneficial to keep than the other employees. He also testified that skill sets will trump seniority in his decision making process, but he will usually "run it past" the superintendent in those instances. The record establishes that the superintendents follow the recommendations of the general foremen regarding which employees are no longer needed.

Once the superintendent decides which of the recommended employees should be let go, he will determine whether the employee should be sent to another project, or should be laid off. Final paychecks are cut for the employees being laid off, and either the superintendent or general foremen will have the employee sign the layoff notice and issue the final paycheck.

d. Authority to recommend the promotion of employees

The Employer has a practice of promoting from within, although it has on occasion sought the dispatch of foremen from the Union's hiring hall. When a project is ramping up and additional crews need to be added, the superintendant will first call other projects to see if any foremen are available. If none are, the superintendent will seek recommendations from the general foremen because the general foremen have more contact with the employees, and thus, more opportunity to assess the employees' skills and leadership capabilities. After the superintendent has met with the general foreman to discuss possible candidates for promotion among the existing journeymen, the superintendent will relay the recommendations to the highest level superintendent, who makes the final decision. The higher level superintendent generally follow the recommendation of the general foremen without further investigation, but do so on a trial basis so that the superintendent can confirm whether the person recommended works out. The general foreman testified that he has made one such recommendation, but the superintendent conducted his own interview with the recommended employee before deciding to promote the employee.

3. Authority to assign work, responsibly direct and discipline employees:

The Employer contends that the general foremen possess and exercise authority to direct the work of unit employees, assign work to unit employees, and discipline unit employees. I shall set forth the facts regarding each of these indicia immediately below.

a. Authority to assign work to employees

The general foreman meets with the superintendent at the start of the day to find out what work needs to be performed and whether there are any emergencies to be dealt with. The general foreman then meets with the foremen for the various crews to tell them the work the superintendent has lined up for that day. During the course of the day, the general foreman will assess the work being done and instruct the foremen to change the work assignments to maximize the work of the crew. The general foreman who testified gave several examples of such situations. The first example was if he sees that a journeyman does not really need the assistance of the apprentice assigned to him, he will instruct the foreman to reassign the apprentice. Another example is if he sees two apprentices working together and the general foreman believes that they should be split up and assigned to work with journeymen so they can learn a new task. The general foreman also described a situation where a foreman had a person on his crew that the foreman was not getting along with. The general foreman recommended to the superintendent that the employee be taken off that crew and switched with an employee from another crew. The superintendent approved the general foreman's recommendation without independent investigation.

The general foreman also testified that he possesses and exercises the authority to grant up to two days off when employees request time off. This authority includes

the authority to deny such requests when the general foreman believes that the work schedule required the presence of the requesting employee. In reaching his determination, the general foreman testified that he assesses the needs of the project by reviewing the job calendar to see if they can do without the employee. The general foreman testified that he has granted or denied 15 to 20 requests for time off during the past year and a half.

The general foreman further testified that on about five occasions during the past year he has determined that employees should be sent home during the work day because of weather conditions. The general foreman testified that in those instances he will decide who will be sent home and who will stay based on the work needed to be performed and the skill level needed to do the job. The general foreman stated that he generally runs his decision to send people home past the superintendent, and the superintendent has agreed with him when he has made such recommendations.

With regard to overtime, there is no evidence that general foremen have the authority to authorize overtime. If general foremen believe that overtime is necessary to maintain the work schedule, they inform their superintendent. The record does not contain any examples of such recommendations being made by general foremen and approved.

The record establishes that overtime is usually performed by the crew working in the area that is behind schedule. Under the terms of the collective-bargaining agreement, employees cannot be compelled to work overtime. In circumstances where less than a full crew is needed, the general foremen or superintendents ask for volunteers. Similarly, if there are not enough volunteers from that crew needing to work

overtime, the general foremen or superintendent ask for volunteers from other crews.

There is no evidence that the general foremen assess the skills of the employees whom they are asking to volunteer for overtime.

Finally, if overtime is worked on a Saturday, the general foreman is the Employer's highest official on the jobsite. In such instances, however, a superintendent is assigned to be on-call if the general foreman encounters any problems.

Accordingly, the general foreman will ask specific employees if they are willing to stay late, or work on Saturday. If the general foreman does not get enough volunteers from the crew whose work requires the overtime, he will ask employees on other crews.

b. Authority to direct the work of employees

The record does not provide significant detail regarding direction of work by the general foremen. Examples given were that general foremen direct individual employees to perform specific tasks such as installing safety cable, or installing mesh on a floor, or directing a laborer to clean a specific area. They also can direct an entire crew to a specific area of the project, although no examples were given. The general foreman testified that he has the authority to direct employees to stop performing the work initially outlined for that day by the superintendent and move them to other work, but he did not give any examples of what this entails.

c. Authority to discipline employees

General foremen have the authority to issue verbal warnings for minor infractions such as failing to wear safety glasses, safety face shields, hard hats or other safety equipment, failing to be properly tied off when working on a ladder, or working too slowly. There is no evidence that verbal warnings are recorded or that the general

foremen inform superintendents of the verbal warnings they issue. General foremen do not have the authority to issue written warnings or other forms of discipline. In fact, even in emergency situations such as someone appearing for work under the influence of alcohol, the general foremen cannot send the employee home, but will send them to the trailer to meet with a superintendent. If such an emergency situation arises on the weekend, the general foreman testified that he would call the on-call superintendent before taking any action.

In normal disciplinary situations, if the general foreman believes that more than a verbal warning is warranted, he will report the situation to the superintendent directly above him on the particular job. This report would involve explaining the facts of what transpired. Thereafter, the superintendent conducts an independent investigation. Depending on the nature or severity of the situation, the superintendent may also contact the human resources department and seek its involvement in the investigation, or the determination of what level of discipline is appropriate. Human resources is always involved if the incident involves harassment or ethical issues. After the investigation is concluded, the superintendent or human resources metes out the discipline, which can be a written warning, suspension, or discharge. The general foreman is not involved in the process once the initial infraction is reported.

ANALYSIS AND FINDINGS

The Employer contends, contrary to the Petitioner, that the general foremen possess and exercise the Section 2(11) supervisory indicia to effectively recommend the hire, transfer, layoff, and promotion of employees, and to assign and direct work and

discipline employees. As noted herein, I find that the general foremen possess and exercise Section 2(11) supervisory indicia with respect to layoffs and granting time off.

A. Applicable Legal Authority

1. Supervisory indicia under the Act

Section 2(11) of the Act defines a "supervisor" as:

Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Section 2(11) is to be read in the disjunctive, and the possession of any one of the Section 2(11) powers will establish supervisory status. *KGW-TV*, 329 NLRB 378, 381 (1999). The requirement of use of independent judgment, however, is conjunctive. Thus, an individual is not a supervisor unless the individual exercises supervisory authority with the use of independent judgment, and holds the authority in the interest of the employer. *Id.*

The requirement that independent judgment be exercised imposes a significant qualification that limits the definition of "supervisor" to include only people who do not exercise the 12 stated Section 2(11) indicia in a merely routine manner. In adding the independent judgment requirement in the definition of "supervisor," Congress sought to distinguish between truly supervisory personnel, who are vested with "genuine management prerogatives," and employees - such as "straw bosses, leadmen, set-up men, and other minor supervisory employees" - who enjoy the Act's protections even though they perform "minor supervisory duties." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280-281 (1974) (*quoting* S. Rep. No. 105, 80th Cong., 1st Sess. 4 (1947)).

Consistent with the congressional intent to distinguish between truly supervisory personnel and those who merely perform minor supervisory duties, the Board is careful not to construe supervisory status too broadly, for a worker who is deemed to be a supervisor loses organizational rights. *KGW-TV*, 329 NLRB 378, 381 (1999). The burden of proving supervisory status is on the party asserting it. *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001).

2. The Board's recent decisions concerning supervisory status

Recently, in light of the Supreme Court's decision in *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001), the Board issued three decisions in which it refined and clarified the analysis to be applied in assessing supervisory status regarding assigning work, direction of work, and independent judgment: *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006); *Croft Metals, Inc.*, 348 NLRB 717 (2006); and *Golden Crest Healthcare Center*, 348 NLRB 727 (2006).

In *Oakwood*, the Board adopted an interpretation of "independent judgment" that focuses on the degree of discretion involved in making a decision, not on the kind of discretion involved (e.g. professional or technical). For an individual's judgment to be "independent" within the meaning of Section 2(11), the individual must form an opinion or evaluation by discerning and comparing data. *Id.* at 692-693. As the Board explained, "actions form a spectrum between the extremes of completely free actions and completely controlled ones, and the degree of independence necessary to constitute a judgment as 'independent' under the Act lies somewhere in between these extremes." *Id.* at 693. The Board found that "a judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or

rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement[.]" but that a judgment is independent even where there is a guiding policy so long as that policy allows for discretionary choices. *Id.*

Additionally, the independent judgment that a putative supervisor exercises must "rise above the merely routine or clerical" for it to be truly supervisory within the meaning of Section 2(11). *Id.* at 693. As stated by the Board:

If there is only one obvious and self-evident choice (for example, assigning the one available nurse fluent in American Sign Language (ASL) to a patient dependent upon ASL for communicating), or if the assignment is made solely on the basis of equalizing workloads, then the assignment is routine or clerical in nature and does not implicate independent judgment, even if it is made free of the control of others and involves forming an opinion or evaluation by discerning and comparing data. *Id.*

B. Application of legal authority to the facts

As noted herein, the Employer contends that the general foremen possess and exercise the Section 2(11) supervisory indicia to effectively recommend the hire, transfer, layoff, and promotion of employees, and to assign and direct work and discipline employees. I find, however, based on the above-cited authority, and the record as a whole, that the Employer has failed to meet its burden of establishing that the general foremen have the authority to effectively recommend the hire, transfer, and promotion of employees, or that the general foremen direct the work of the employees or discipline employees.

I find further, that the Employer has met its burden of establishing that the foremen effectively recommend the lay off of employees, and that the foremen use independent judgment in assigning work by granting and denying requests for time off. In this regard, I find the testimony of the general foreman regarding his authority to grant

or deny requests for time off to be particularly persuasive. In *Golden Crest*, supra, the Board reaffirmed existing case law holding that for supervisory status to exist, the alleged supervisor's authority with regard to Section 2(11) functions must include the power to require employees to undertake certain actions. The Board reiterated that supervisory authority is not established where the putative supervisor has the authority merely to request that an employee take a certain action. *Id.* at 729. Based on the general foreman's testimony that if he denies a request for time off, the employee must come to work, and that he has granted or denied such requests between 15 to 20 times in the past year and a half, I am compelled to find that supervisory status exists.

1. Authority to effectively recommend hire, transfer, layoff, and promotions:

The Employer contends that the general foremen possess and exercise authority to effectively recommend the hire, transfer, layoff, and promotions of employees.

a. The evidence does not establish that general foremen have the authority to effectively recommend the hiring of employees

In *Oakwood*, the Board found that "a judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement[.]" but that a judgment is independent even where there is a guiding policy so long as that policy allows for discretionary choices. *Id.*

Based on the *Oakwood* analysis, I find that the Employer has failed to establish that general foremen have the authority to effectively recommend the hiring of employees. The record establishes that crew sizes are determined by the labor budget on a given project, and that the ultimate decision of when to hire more employees is made by the superintendents. Additionally, while the general foremen have some

involvement in site orientation for new employees, such site orientation merely involves explaining established safety and work rules. Thus, hiring needs and site orientations are strictly dictated by the Employer' budget and existing rules and policies, and there is no evidence that the general foremen have any discretion to deviate from the established policies. Moreover, the ultimate decision on when to hire and how many employees will be hired rest with the superintendents, and there is no evidence to establish that the superintendents' decisions are based on recommendations by the general foremen.

b. The evidence does not establish that general foremen have the authority to recommend the transfer of employees

The Employer contends that the general foremen have the authority to recommend the transfer of employees. I find that the record is devoid of evidence to support this contention. In this regard, the evidence establishes that the superintendents have the sole authority to determine if an employee should be transferred to another project or laid off, and there is no evidence that the general foremen have any input into such decisions.

c. The evidence establishes that general foremen have the authority to determine which employees should be retained, laid off or transferred

With regard to lay offs, I find that the general foremen utilize the requisite independent judgment contemplated by the Board in *Oakwood* to determine which employees should be kept and which should be laid off or transferred. In this regard, as a project winds down, the general foremen make specific recommendations to the superintendent regarding which employees should be kept and which should go based on the general foremen's evaluation of the skills, productivity, and attendance of the

given employees. As noted, the general foreman who testified stated that he makes his recommendations based on who he believes is more “well-rounded,” and therefore more beneficial to keep than the other employees. The record also establishes that the superintendents follow the recommendations of the general foremen without independent investigation.

d. The evidence does not establish that general foremen have the authority to promote employees

I find that the Employer has failed to establish that the general foremen have the authority to effectively recommend the promotion of employees. In this regard, the record establishes that the superintendents do seek recommendations from the general foremen for candidates to promote to foremen positions. However, even the lower level superintendents cannot promote employees without authorization from a higher level superintendent. To the extent that recommendations by general foremen are adopted and recommended by superintendents, the promotions are on a trial basis. Moreover, the general foreman testified that he has only been asked once for such a recommendation, and in that instance, the superintendent conducted his own interview with the recommended employee before deciding to promote the employee.

2. Authority to assign and direct work and to discipline employees:

The Employer contends that the general foremen possess and exercise authority to direct the work of unit employees, assign work to unit employees, and discipline unit employees. As discussed below, I find that the general foremen do possess the authority to assign work but do not responsibly direct employees or discipline them.

a. Board precedent and Regional determination concerning assignment of work

The Board in *Oakwood* construed the Section 2(11) term “assign” to refer to “the act of designating an employee to a place (such as a location, department, or wing), appointing an individual to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks to an employee.” *Oakwood*, supra, at 689.

Specifically, the Board stated:

[T]o ‘assign’ for purposes of Section 2(11) refers to the . . . designation of significant overall duties to an employee, not to the . . . ad hoc instruction that the employee perform a discrete task. That is, the place, time, and work of an employee are part of his/her terms and conditions of employment. In the health care setting, the term “assign” encompasses the charge nurses’ responsibility to assign nurses and aides to particular patients. It follows that the decision or effective recommendation to affect one of these—place, time, or overall tasks—can be a supervisory function. The assignment of an employee to a certain department (e.g., housewares) or to a certain shift (e.g., night) or to certain significant overall tasks (e.g., restocking shelves) would generally qualify as “assign” within our construction.

While the Board in *Oakwood*, *Croft Metals*, and *Golden Crest* did not specifically address the specific issue before me regarding granting or refusing to grant requested days off, I find based on the above quotation, that granting time off is fairly encompassed within the Board’s *Oakwood* assignment of work analysis because it involves the “time” element discussed by the Board. Moreover, while the time off issue was not directly addressed in the *Oakwood* trilogy, it was cited by the Regional Director in *Croft*. I also find several other cases instructive to my analysis.

In *Gerbes Super Market, Inc.*, 213 NLRB 803 (1974), the Board affirmed, without discussion, an Administrative Law Judge’s finding that the meat department manager was a statutory supervisor on the basis that the meat department manager effectively

changed employee break times based on meat departmental needs, and recommended implementation of two policies relating to time off. The first policy was to rotate Saturdays off among the meat department employees, and the second policy was to allow meat department employees who so desired, to leave early if the degree of business and activity in the meat department warranted releasing employees early.

Gerbes Super Market was also discussed by the ALJ in *Davis Supermarkets, Inc.*, 306 NLRB 426 (1992). In *Davis Supermarkets*, the Board affirmed, without discussion, the ALJ's finding that the bakery manager was a statutory supervisor on the basis that the purported supervisor:

[E]xercised significant control over the assignment of work within the bakery department; that she alone decided how many hours per week to schedule each employee, which employees would receive days off on Sundays, holidays, and other special requests, and which requests for specific work shifts would be honored, and she assigned overtime work, *Food Mart*, 162 NLRB 1420 (1967), *Food Marts, Inc.*, 200 NLRB 18 (1972) (allocation of hours), *Gerbes Super Market*, 213 NLRB 803 (1974) (granting permission to leave work early), and *Kroger Co.*, 228 NLRB 149 (1977) (scheduling) . . . [*Id.*, at 457.]

Gerbes Super Market was discussed affirmatively for the time off finding by the Regional Director in *Croft*, supra, at Appendix fn 12. While the Board in *Croft* did not specifically address this issue, the Board adopted the Regional Director's overall findings that the leadmen were not statutory supervisors. With regard to time off, the Regional Director had noted that there was no evidence that the lead men could grant time off.

Based on the foregoing, and the record as a whole, I find that the general foremen are statutory supervisors based on their authority to grant and deny employee requests for time off. In this regard, the general foreman testified that he possesses and exercises the authority to grant up to a couple of days off without seeking approval

from a superintendent. The authority exercised by the general foremen includes the authority to deny such requests when the general foreman believes that the work schedule requires the presence of the requesting employee. I further find that the general foremen use independent judgment in determining whether to grant or deny the request based on the general foreman's testimony that he assesses whether they can perform all the necessary work without the employee, and denies the request if in his view they cannot. Finally, I note that requests for time off are not rare in that the general foreman testified that he has granted or denied 15 to 20 requests for time off in the past year and a half.

I also find that the general foremen possess the authority to assign work based on the fact that they effectively make recommendations to the superintendents that certain employees should be sent home because they cannot safely or effectively perform their work due to weather conditions. The general foreman testified that he has made such decisions about five times during the past year.

Finally, I find that the Employer has not met its burden of establishing that the general foremen use the requisite independent judgment in assigning overtime. In this regard when overtime is worked on a Saturday, while the general foreman is the highest official on the jobsite, he reports any problems he encounters to the assigned on-call superintendent. I further find that the Employer has failed to establish any evidence that general foremen have the authority to authorize overtime. Rather, the evidence establishes that superintendents determine if overtime is warranted. When overtime is authorized, it is usually worked by the same crew which is performing the work requiring overtime. Employees cannot be compelled to work overtime, so the general foremen

or superintendents seek volunteers. There is no evidence that the general foremen exercise any discretion in determining the employees they solicit as overtime volunteers.

b. Board precedent and Regional determination concerning responsible direction of work

The Board in *Oakwood* held that for responsible direction to exist within the meaning of Section 2(11), the putative supervisor must direct and perform oversight of employees, and be accountable for the performance of tasks by those employees such that adverse consequences may befall the putative supervisor if the employees do not properly perform the tasks. See *Oakwood*, supra, at 692. Thus, embodied in the *Oakwood* "accountability" analysis, is the element that the putative supervisor must have the authority to take corrective action if an employee refuses such direction.

Specifically, the Board stated:

The person directing and performing oversight of [an] employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly. . . . Thus, to establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps." Id at 691-692. [Emphasis added.]

I find that the record evidence is insufficient to establish the requisite accountability factor required under *Oakwood*. The record does not provide significant detail regarding direction of work by the general foremen. While the general foreman gave a few examples of his directing the foremen to reassign certain employees, the examples given appeared to relate more to training than work necessity. Moreover, the

Employer did not offer any evidence establishing that the general foremen face the prospect of adverse consequences if the work is not performed on time by the crews.

c. The evidence does not establish that general foremen have the authority to discipline employees

I find that the evidence adduced by the Employer regarding general foremen's purported supervisory authority to discipline employees lacks the necessary evidence of the decision making factors to establish that the general foremen employ independent judgment as defined by the Board in *Oakwood*. In this regard, while the general foremen have the authority to issue verbal warnings for minor infractions, there is no evidence that they record these warnings or relay them to superintendents. Accordingly, the verbal warnings do not form the basis for progressive discipline.

I find further that the record clearly establishes that the general foremen do not have the authority to issue written warnings or other forms of discipline. In fact, even in emergency situations such as someone appearing for work under the influence of alcohol, the general foremen cannot send the employee home, but will send them to the trailer to meet with a superintendent. If such an emergency situation arises on the weekend, the general foreman testified that he would call the on-call superintendent before taking any action. If the general foreman believes that more than a verbal warning is warranted, he reports the situation to the superintendent directly above him on the particular job. Thereafter, the superintendent conducts an independent investigation and the general foremen have no further involvement in the disciplinary process.

There are approximately 12 employees in the bargaining unit.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the Notice of Election to issue subsequently, subject to the Board's Rules and Regulations.⁶ Eligible to vote are those in the unit as described above who are employed by the Employer during the payroll period ending immediately preceding the date of this Decision and Direction of Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.⁷ Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such a strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement of that strike and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.

⁶ Your attention is directed to Section 103.20 of the Board's Rules and Regulations. Section 103.20 provides that the Employer must post the Board's Notice of Election at least three full working days before the election, excluding Saturdays and Sundays, and that its failure to do so shall be grounds for setting aside the election whenever proper and timely objections are filed.

⁷ Based on the stipulation of the parties and applicable Board authority, I find that the **Daniel/Steiny** eligibility formula is applicable. Accordingly, those eligible to vote shall also include those employees in the unit found appropriate who have been employed 30 working days or more within the 12 months, or who have had some employment within that period and who have been employed 45 working days or

Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by:

Carpenters District Council of Kansas City and Vicinity

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses, which may be used to communicate with them. See *Excelsior Underwear Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359 (1994). Accordingly it is hereby directed that within seven (7) days from the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all the eligible voters shall be filed by the Employer with the Undersigned, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office, National Labor Relations Board, 600 17th Street, 700 North Tower, Dominion Plaza, Denver, CO, 80202, on or before **June 21, 2010**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by electronic filing through the Agency's website, **www.nlrb.gov**,⁸ or by

more within the 24 months immediately preceding the eligibility date for the election, and who have not been terminated for cause or quit voluntarily.

⁸ To file the list electronically, go to www.nlrb.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu. When the E-File page opens, go to the heading **Regional, Subregional and Resident Offices** and click on the "File Documents" button under that heading. A page then appears describing

facsimile transmission to (303) 844-6249. The burden of establishing timely filing and receipt of the list will continue to be placed on the sending party.

Since the list is to be made available to all parties to the election, please furnish a total of 4 copies, unless the list is submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

NOTICE OF POSTING OBLIGATIONS

According to the Board's Rules and Regulations, Section 103.21, Notices of Election must be posted in areas conspicuous to potential voters for a minimum of three (3) working days prior to the day of the election. Failure to follow the posting requirement may result in additional litigation should proper objections to the election be filed. Section 103.20(c) of the Board's Rules and Regulations requires an employer to notify the Board at least five (5) full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. See *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

PROCEDURES FOR FILING A REQUEST FOR REVIEW

Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and filing of Papers, the request for review must be received by the Executive Secretary of the Board in Washington, D.C., by close of business on **June 28, 2010, at 5 p.m. Eastern Time**, unless filed electronically. **Consistent with**

the E-Filing terms. At the bottom of this page, the user must check the box next to the statement indicating that the user has read and accepts the E-Filing terms and then click the "Accept" button. The user then completes a form with information such as the case name and number, attaches the document containing the election eligibility list, and clicks the Submit Form button. Guidance for E-filing is contained

the Agency's E-Government initiative, parties are encouraged to file a request for review electronically. If the request for review is filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:59 p.m. Eastern Time** on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of a request for review by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file.⁹

A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing a request for review electronically may be accomplished by using the E-Filing system on the Agency's website at www.nlr.gov. Once the website is accessed, select the E-Gov tab, click on E-Filing, and follow the detailed directions.

The responsibility for the receipt of the request for review rests exclusively with the sender.

A failure to timely file an appeal electronically will not be excused on the basis of a claim that the receiving machine was off-line or unavailable, the sending machine

in the attachment supplied with the Regional Office's initial correspondence on this matter, and is also located under "E-Gov" on the Board's web site, **www.nlr.gov**.

⁹ A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.

malfunctioned, or for any other electronic-related reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Dated at Denver, Colorado, this 14th day of June, 2010

Wanda Pate Jones, Regional Director
Wanda Pate Jones, Regional Director
National Labor Relations Board, Region 27
600 Seventeenth Street
700 North Tower, Dominion Towers
Denver, Colorado 80202-5433